Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1996

SOUTHWEST AIRLINES CO.,

Petitioner

v.

PATRICK FENNESSY,

Respondent.

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a Railway Labor Act system board of adjustment has exclusive initial jurisdiction of an employee's claim of wrongful discharge in violation of section 152, Fourth of the RLA?

ALL PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to the proceeding. Southwest Airlines Co. is a Texas corporation. It has no parent companies, subsidiaries or affiliates that have issued shares to the public.

TABLE OF CONTENTS

Question Presented for Review i

All Parties to the Proceeding ii

Table of Authorities v

Citation of Official Report of Opinion 1

Statement of Basis for Jurisdiction 1

Statutes Involved in the Case 2

Statement of the Case 2

Argument and Authority 3

Error of the Ninth Circuit 3

Important Question of Federal Law Which Has Not, But Should Be, Settled by this Court 4

Traditional Minor Dispute Analysis As Applied in Norris Is Inadequate to Statutory Claim Presently Before the Court 5

Function and Relationship of System Boards of Adjustment and Federal Courts 7

Competence of System Boards 9

Statutory and Judicial Safeguards 12

Conclusion 13

Appendix

Decision of the Ninth Circuit . . . . . App. 1

Order of the District Court . . . . . App. 2

Order of the Ninth Circuit Denying Rehearing App. 3

Relevant Provisions of the Railway Labor Act App. 4

45 U.S.C. § 151a(1)(2)(5) . . . . . App. 4.1
45 U.S.C. § 152, First . . . . . App. 4.1
45 U.S.C. § 152, Fourth (partial) . . . . App. 4.1
45 U.S.C. § 152, Eighth (partial) . . . . App. 4.2
45 U.S.C. § 153, First (q) (partial . . . App. 4.2
45 U.S.C. § 184 (partial) . . . . . App. 4.3

TABLE OF AUTHORITIES

Cases

Alexander v. Gardner-Denver Co.
415 U.S. 36, 94 S. Ct. 1011 (1974) 9, 10

Atchison, T. & S.F.R.R. v. Buell
480 U.S. 557, 107 S. Ct. 1410 (1987) 4, 5

Brotherhood of Locomotive Eng'rs v. Louisville & N.R.R.
373 U.S. 33, 83 S. Ct. 1059 (1963) 4

Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Texas Ry.
363 U.S. 528, 80 S. Ct. 1326 (1960) 8

Brotherhood of R.R. Trainmen v. Chicago R. & I.R. Co.
353 U.S. 30, 77 S. Ct. 635 (1957) 5, 8

Burke v. Compania Mexicana de Aviacion
433 F.2d 1031 (9th Cir. 1970) 8

Consolidated Rail Corp. v. Railway Labor Exec's Ass'n
491 U.S. 299, 109 S. Ct. 2477 (1989) 5

Elgin, J.& E. Ry. v. Burley
325 U.S. 711, 65 S. Ct. 1282 (1945) 5

Fennessy v. Southwest Airlines
91 F.3d 1359 (9th Cir. 1996) 1

Ford Motor Co. v. Huffman
345 U.S. 330, 73 S. Ct. 681 (1953) 12

Gilmer v. Interstate/Johnson Lane Corp.
500 U.S. 20, 111 S. Ct. 1647 (1991) 7, 10

Hawaiian Airlines, Inc. v. Norris
___ U.S. ___, 114 S. Ct. 2239 (1994) 3-6, 9

Hines v. Anchor Motor Freight, Inc.
424 U.S. 554, 96 S. Ct. 1048 (1976) 13

Lingle v. Norge Div. of Magic Chef, Inc.
486 U.S. 399, 108 S. Ct. 1877 (1988) 6

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.
473 U.S. 614, 105 S. Ct. 3346 (1985) 6-8, 12

Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.
460 U.S. 1, 103 S. Ct. 927 (1983) 7

Roscello v. Southwest Airlines Co.
726 F.2d 217 (5th Cir. 1984) 8

Steelworkers v. Warrior & Gulf Nav. Co.
363 U.S. 574, 80 S. Ct. 1347 (1960) 6

Switchmen's v. National Mediation Bd.
320 U.S. 297, 64 S. Ct. 95 (1943) 8, 9

Texas Int'l Airlines, Inc.
68 L.A. 244 (Gruenberg, 1976) 11

Trans World Airlines v. Independent Fed'n of Flight Attendants
489 U.S. 426, 109 S. Ct. 1225 (1989) 8, 9

Transportation Union v. Union Pac. R.R.
385 U.S. 157, 87 S. Ct. 369 (1966) 6

Union Pac. R.R. v. Sheehan
439 U.S. 89, 99 S. Ct. 399 (1978) (*per curiam*) . . . 4

Vaca v. Sipes
386 U.S. 171, 87 S. Ct. 903 (1967) 9, 13

Virginian Ry. v. Railway Employees
300 U.S. 515, 57 S. Ct. 592 (1937) 7

Wells v. Southern Airways, Inc.
517 F.2d 132 (5th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976); 616 F.2d 107 (5th Cir. 1980) 11, 12

Statutes

28 U.S.C. § 1254(1) 1
42 U.S.C. §§ 1981, 1981a, 2000e and 2000e-4 . . 10

Railway Labor Act

45 U.S.C. § 151 *et seq.* 2
45 U.S.C. § 152, Fourth . . . . . *passim*
45 U.S.C. § 152, Eighth 6, 11, 12
45 U.S.C. § 153 11
45 U.S.C. § 153, First (q) 13

Federal Arbitration Act
9 U.S.C. § 1 *et seq.* 7

Federal Employers' Liability Act
45 U.S.C. § 51 *et seq.* 4

Title VII of the Civil Rights Act of 1964, as amended
42 U.S.C. § 2000e *et seq.* 10

Miscellaneous

Elkouri & Elkouri, *How Arbitration Works*, 4th ed.,
1985-89 Cumulative Supplement, pp. 107-08 11

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SOUTHWEST AIRLINES CO.,

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v.

PATRICK FENNESSY,

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On Petition for Writ of Certiorari from the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Citation of Official Report of Opinion

Sought to be reviewed is a decision of the United States Court of Appeals for the Ninth Circuit, *Fennessy v. Southwest Airlines*, 91 F.3d 1359 (9th Cir. 1996).

Statement of Basis for Jurisdiction

The Ninth Circuit rendered its decision on August 7, 1996. (App. 1.) Thereafter, Southwest timely filed a combined petition for rehearing and suggestion for rehearing en banc which was denied by the Ninth Circuit by order dated December 6, 1996. (App. 3.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review on a

writ of certiorari the judgment or decree of the Ninth Circuit.

Statutes Involved in the Case

Relevant provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* are set forth in the Appendix. (App. 4.)

Statement of the Case

Patrick Fennessy claims that Southwest Airlines Co. violated section 152, Fourth of the Railway Labor Act, 45 U.S.C. § 152, Fourth, by terminating his employment in retaliation for his efforts to replace his existing union with a different one. The district court granted summary judgment for Southwest, concluding that Fennessy's exclusive remedy was through the system board of adjustment. (App. 2.) The Ninth Circuit reversed. (App. 1.)

Fennessy was employed by Southwest as a ramp agent. While driving a baggage cart, he struck an aircraft, resulting in damage to the aircraft and a delay of the flight until it could be determined whether the aircraft was airworthy. Thereafter, Southwest conducted a factfinding session which resulted in the termination of Fennessy's employment. The stated reason for Fennessy's termination was his striking the aircraft and failing to report it in accordance with Southwest policy. (App. 1.2.)

Fennessy was a member of the Ramp Operations and Provisioning Agents ("ROPA"), as required by the collective bargaining agreement between Southwest and ROPA. ROPA has been the recognized collective bargaining representative

for Southwest ramp agents since 1988.[1] Following the accident, Fennessy sought and obtained the assistance of the ROPA representative. Upon his termination, Fennessy filed a grievance through ROPA and the matter proceeded to a hearing before a system board of adjustment, consisting of two members of Southwest's management and two ROPA members. The system board of adjustment upheld Fennessy's termination. (App. 1.2.)

Fennessy did not seek judicial review of the system board decision. Rather, he filed the present action in the United States District Court for the Central District of California, alleging that Southwest violated 45 U.S.C. § 152, Fourth, by terminating his employment in retaliation for his having engaged in activities to replace ROPA with the Teamsters union. In the district court, Fennessy made no claim that ROPA did not fairly represent him in the system board hearing. He raised that issue for the first time on appeal to the Ninth Circuit. (App. 1.2-3.)

Argument and Authority

Error of the Ninth Circuit

In reversing the district court, the Ninth Circuit concluded that Fennessy had a judicially cognizable cause of action under section 152, Fourth, and that he was not required to submit that statutory claim to the system board of adjustment. The Ninth Circuit fell into error in several respects. First, it placed undue reliance upon this Court's decision in *Hawaiian Airlines, Inc. v. Norris*, ___ U.S. ___,

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[1] In late 1996, ROPA merged with the Transport Workers Union of America, AFL-CIO. The entity formerly known as ROPA is now TWU Local 555.

114 S. Ct. 2239 (1994). The *Norris* decision was limited to the issue of whether an employee's state cause of action is *preempted* by the RLA. It did not involve the issue of the appropriate forum for resolving an individual employee's claim of a statutory violation of the RLA. Second, the Ninth Circuit failed to give proper deference to the strong federal labor policy favoring submission of employee disputes to the arbitral tribunals mandated by the RLA.

Important Question of Federal Law Which Has Not, But Should Be, Settled by this Court

Prior to 1934, arbitration procedures contained in the RLA were voluntary. They proved to be ineffective. Consequently, in 1934 the RLA was amended to provide for a dispute resolution procedure which is "mandatory, exclusive, and comprehensive." *Brotherhood of Locomotive Eng'rs v. Louisville & N.R.R.*, 373 U.S. 33, 36-38, 83 S. Ct. 1059, 1061-62 (1963). "The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 94, 99 S. Ct. 399, 402 (1978) (*per curiam*).

Using the traditional definition of minor dispute, this Court in *Norris* held that an employee's state law claim was not preempted by the RLA because the source of the claim existed independently of the collective bargaining agreement. 114 S. Ct. at 2245-49. *See also Atchison, T. & S.F.R.R. v. Buell*, 480 U.S. 557, 107 S. Ct. 1410 (1987) (RLA employee may pursue judicial remedies under the Federal

Employers' Liability Act, 45 U.S.C. § 51 *et seq.*). Left unanswered by the *Norris* and *Buell* decisions is the question of whether an individual employee's claim of wrongful discharge in violation of section 152, Fourth of the RLA must be submitted initially to the statutorily created adjustment board.

Traditional Minor Dispute Analysis As Applied in Norris Is Inadequate to Statutory Claim Presently Before the Court

This Court has repeatedly defined "major" and "minor" disputes under the Act. Briefly, major disputes are those arising from the negotiation of new collective bargaining agreements or the renegotiation of existing agreements. Minor disputes are those arising from the interpretation and application of existing collective bargaining agreements. *Elgin, J.& E. Ry. v. Burley*, 325 U.S. 711, 723, 65 S. Ct. 1282, 1290 (1945); *Consolidated Rail Corp. v. Railway Labor Exec's Ass'n*, 491 U.S. 299, 302, 109 S. Ct. 2477, 2480 (1989). Minor disputes have been described as "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Brotherhood of R.R. Trainmen v. Chicago R.& I.R. Co.*, 353 U.S. 30, 33, 77 S. Ct. 635, 637 (1957). In other words, "major disputes seek to create contractual rights, minor disputes to enforce them." *Conrail*, 491 U.S. at 302, 109 S.Ct. at 2480, citing *Burley*, 325 U.S. at 723, 65 S. Ct. at 1289-90.

However, the Court's traditional minor dispute analysis as applied in *Norris* is inadequate when applied to the statutory claim presently before the Court. First, the Court in *Norris* took too restrictive a view of the nature of collective bargaining agreements when it concluded that a

run-of-the-mill discharge case presents nothing more than "'purely factual questions' about an employee's conduct or an employer's conduct and motives [which] do not 'requir[e] a court to interpret any term of a collective bargaining agreement .'" *Norris*, 114 S. Ct. at 2248, quoting *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407, 108 S. Ct. 1877, 1882 (1988). For as this Court has repeatedly stated: "A collective bargaining agreement is not an ordinary contract . . . . 'The collective agreement covers the whole employment relationship. It calls into being a new common law--the common law of a particular industry or of a particular plant'" *Transportation Union v. Union Pac. R.R.*, 385 U.S. 157, 160-61, 87 S. Ct. 369, 371 (1966), quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578-79, 80 S. Ct. 1347, 1350-51 (1960). Moreover, in the case presently before the Court, the statutory protection at issue is incorporated, by statute, into every RLA collective bargaining agreement. Specifically, under the RLA, the rights under section 152, Fourth are incorporated by statute into every collective bargaining agreement. 45 U.S.C. § 152, Eighth.

Additionally, the minor dispute analysis as applied in *Norris* fails to consider that even purely statutory claims may be appropriate for resolution in arbitral tribunals. As in the case presently before the Court, where a discharged employee makes a statutory claim, and where an RLA collective bargaining agreement broadly provides for the submission of all discharge cases to the statutorily mandated adjustment board, this Court should look beyond its traditional minor dispute analysis and carefully examine the source of any claimed statutory right to determine whether "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,

473 U.S. 614, 628, 105 S. Ct. 3346, 3354-55 (1985). The burden should be on the employee "to show that Congress intended to preclude a waiver of a judicial forum" for his RLA claim. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 1652 (1991). "If such an intention exists, it will be discoverable in the text of the [RLA], its legislative history, or an 'inherent conflict' between arbitration and the [RLA's] underlying purposes." *Id.* While conducting this analysis, the Court should bear in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983). (Although *Moses H. Cone* involved the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, it cannot be seriously maintained that the FAA evinces a stronger federal policy favoring arbitration than that *mandated* by the RLA.) By requiring an employee to first submit his statutory discharge claim to the adjustment board, he "does not forego the substantive rights afforded by the statute; [he] only submits to their resolution in an arbitral, rather than a judicial forum." *Mitsubishi*, 473 U.S. at 628, 105 S. Ct. at 3354.

Function and Relationship of
System Boards of Adjustment and Federal Courts

Federal courts, in the exercise of their equity jurisdiction, possess the authority to compel compliance with the duties and obligations of the Railway Labor Act. *Virginian Ry. v. Railway Employees*, 300 U.S. 515, 57 S. Ct. 592 (1937). However, as the Court later explained, "we have understood judicial intervention in RLA procedures to be limited to those cases where 'but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the

Railway Labor Act.'" *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 441, 109 S. Ct. 1225, 1234-35 (1989), quoting *Switchmen's v. National Mediation Bd.*, 320 U.S. 297, 300, 64 S. Ct. 95, 96 (1943).

Consistent with this principle, it is understandable that where there has not yet been established a system board of adjustment, it is appropriate for the federal courts to entertain suits by individual employees to enforce their rights under section 152, Fourth.[2] *See, e.g., Burke v. Compania Mexicana de Aviacion*, 433 F.2d 1031 (9th Cir. 1970). "To hold, in this case, that Burke may not bring suit for a violation of section 2 (Fourth) would leave a gap in the enforcement of that section which would blunt the effectiveness of the congressional purpose." *Id.* at 1033. *See also Roscello v. Southwest Airlines Co.*, 726 F.2d 217 (5th Cir. 1984) (jurisdiction in federal court not contested where no collective bargaining agreement existed, and carrier declined to entertain grievance in the absence of a collective bargaining agreement).

Additionally, of course, even where a system board has been established, judicial intervention may be necessary in order to preserve the integrity and jurisdiction of the board. *Brotherhood of R.R. Trainmen*, 353 U.S. 30, 77 S. Ct. 635; *Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Texas Ry.*, 363 U.S. 528, 80 S. Ct. 1326 (1960). Similarly, if the employee is arbitrarily and discriminatorily denied access to the system board, obviously, he should be permitted to

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[2] "Section 2 Fourth was enacted as part of the 1934 amendments to the RLA. From the time of our very first opportunity to interpret the 1934 amendments, we have viewed them as addressing primarily the precertification rights and freedoms of unorganized employees." *Trans World Airlines*, 489 U.S. at 440, 109 S. Ct. at 1234.

proceed to federal court. *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903 (1967).

But where, as here, there exists a contractual system board of adjustment as required by the RLA; the relevant collective bargaining agreement provides for the submission of all discharge cases to the system board; the employee invokes jurisdiction of the system board and fully participates in that hearing; the union represents the employee in the grievance procedure and before the system board; there is no evidence of actual bias or impropriety; the employee makes no claim that the union breached its duty of fair representation until the case is pending on appeal before the Ninth Circuit; and the system board sustains the employee's discharge, there is no reason in either logic or the statute which would permit the employee to proceed to federal court, not for the purpose of seeking review of the adjustment board decision, but to claim, belatedly and for the first time, that his discharge was in violation of section 152, Fourth. This is *not* a case where "'but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act.'" *Trans World Airlines*, 489 U.S. at 441, 109 S. Ct. at 1235, quoting *Switchmen's*, 320 U.S. at 300, 64 S. Ct. at 96.

Competence of System Boards

The Court's observation in *Norris* and in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53-57, 94 S. Ct. 1011, 1022-24 (1974) that questions of statutory construction and application are beyond the experience and authority of labor arbitral tribunals is factually disputable and manifests a continuing "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to

would-be complainants" and, as such, is "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Gilmer*, 500 U.S. at 30, 111 S. Ct. at 1654. Indeed, one need look no further than footnote 21 in *Gardner-Denver* to find a judicial acknowledgment that labor arbitrators routinely consider and apply statutory rights:

> We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with Title VII,[3] the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators.

Gardner-Denver, 415 U.S. at 60 n. 21, 94 S. Ct. at 1025 n. 21. Similarly:

> An increasing number of arbitrators have relied on Title VII doctrine to decide their cases, especially where the agreement explicitly stated that the parties would comply with the anti-discrimination law.
>
> If a nondiscrimination clause existed in the agreement, arbitrators have construed this to require their

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[3] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* Significantly, after *Gardner-Denver*, Congress encouraged alternative dispute resolution, including arbitration, to resolve Title VII disputes. *See* section 118 of Pub. L. 102-166, set out as a note under 42 U.S.C. §§ 1981, 1981a, 2000e and 2000e-4.

> consideration of Title VII. If the agreement contained no mention of antidiscrimination, arbitrators have continued to recognize that the concepts of just cause and unlawful discrimination are now merged.

Elkouri & Elkouri, *How Arbitration Works*, 4th ed., 1985-89 Cumulative Supplement, pp. 107-08.

Moreover, of particular significance to the case *sub judice*, section 152, Fourth is by statute made a part of every collective bargaining agreement. 45 U.S.C. § 152, Eighth. Consequently, whenever there is an allegation that an employee has suffered discipline because of union activity, the arbitral tribunal is required by law to interpret and apply the statutory provision as if it were part of the collective bargaining agreement. *Texas Int'l Airlines, Inc.*, 68 L.A. 244 (Gruenberg, 1976).

Finally, although the RLA provides for an equal number of union and management representatives on system boards of adjustment, 45 U.S.C. § 153, bias should not be presumed solely because the aggrieved employee is claiming discrimination because of activities antithetical to the incumbent union. For notwithstanding the origin of their appointment, all system board members are "charged with the responsibility of impartially deciding the case before the Board." *Wells v. Southern Airways, Inc.*, 517 F.2d 132, 134 (5th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976); 616 F.2d 107 (5th Cir. 1980) (system board, which included union members who had participated in strike, held competent to hear non-union strike breaker's claims of retaliation, collusion and discrimination--absent evidence of actual bias, bias would not be presumed).

Statutory and Judicial Safeguards

The system board of adjustment is an appropriate forum for resolving an employee's claim under section 152, Fourth, and sufficient statutory and judicial safeguards exist to protect a claimant's rights. More particularly:

(1) By statute, section 152, Fourth, is made a part of every RLA collective bargaining agreement. 45 U.S.C. § 152, Eighth.

(2) By requiring an employee to first submit his statutory discharge claim to the adjustment board, he "does not forego the substantive rights afforded by the statute; [he] only submits to their resolution in an arbitral, rather than a judicial forum." *Mitsubishi*, 473 U.S. at 628, 105 S. Ct. at 3354.

(3) Union/management composition of system boards is contemplated by the RLA, and each board member is charged with the responsibility for exercising his duties in an unbiased and nondiscriminatory manner, even where the claimant is by union affiliation or non-affiliation "institutionally" adverse. *Wells*, 517 F.2d 132, 616 F.2d 107.

(4) If a claimant establishes that any board member is actually biased the board decision may be set aside. *Id.* Similar to the duty of fair representation imposed upon a statutory bargaining representative, a system board of adjustment, as a statutory tribunal, should be "subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S. Ct. 681, 686 (1953).

(5) An employee claimant has the statutory right of judicial review of any system board decision. 45 U.S.C. § 153, First (q).

(6) A union has a duty of fair representation and may not handle an employee's claim in a manner which is arbitrary, discriminatory or in bad faith. *Vaca*, 386 U.S. at 190, 87 S. Ct. at 916. If the union's breach of its duty results in an inadequate presentation of the employee's claim, the board decision may be set aside. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S. Ct. 1048 (1976).

Conclusion

In deciding whether an employee's claim of wrongful discharge in violation of section 152, Fourth must be submitted initially to a system board of adjustment, this Court should not limit itself to its traditional minor dispute analysis. For although section 152, Fourth is by statute made a part of each collective bargaining agreement; and although virtually every wrongful discharge case will require interpretation and application of the collective bargaining agreement in its broader sense, *i.e.* the written agreement as well as the common law of the shop, the Court should also consider whether Congress has manifested an intention to preclude a waiver of judicial remedies for the statutory right at issue. The burden should be on the employee to establish such a congressional intention from the text of the statute, its legislative history or by demonstrating that there is an inherent conflict between arbitration and the RLA's underlying purposes. While conducting this analysis, the Court should bear in mind that questions of arbitrability must

be addressed with a healthy regard for the federal policy favoring arbitration.

The text of the RLA and its legislative history evince an indisputable congressional intent to require carriers and employee representatives to resolve employee disputes within the framework of the statutorily created dispute resolution tribunals. The RLA requires carriers and unions to establish system boards of adjustment to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers. Congress considered it essential to keep these disputes within the adjustment boards and out of the courts. Judicial intervention should be limited to those cases where but for the general jurisdiction of the federal courts, there would be no adequate remedy to enforce the employee's statutory right. Consistent with this congressional intent, a system board of adjustment must have exclusive initial jurisdiction of an employee's claim of wrongful discharge in violation of section 152, Fourth of the RLA. Restated more simply, the system is in place. Let it work.

In the case presently before the Court, there existed a statutory system board which possessed the experience and authority to enforce the provisions of section 152, Fourth. Consistent with federal policy favoring arbitration of statutory claims, Fennessy should have submitted his statutory claim initially to the system board.

This is an important question of federal law which has not been, but should be, settled by this Court. Consequently, Petitioner prays the Court to grant its petition

for writ of certiorari and to settle this important question of federal law as urged by Petitioner.

Respectfully submitted,

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APPENDIX

APPENDIX TABLE OF CONTENTS

App. 1 Decision of the Ninth Circuit

App. 2 Order of the District Court

App. 3 Order of the Ninth Circuit Denying Rehearing

App. 4 Relevant Provisions of the Railway Labor Act

Patrick FENNESSY, Plaintiff-Appellant,

v.

SOUTHWEST AIRLINES,
Defendant-Appellee.

No. 94-55630.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 13, 1995.
Decided Aug. 7, 1996.

Appeal from the United States District Court for the Central District of California, Richard A. Gadbois, Jr., District Judge, Presiding. D.C. No. CV-93-02820-RG.

Before: FLETCHER, CANBY, and HAWKINS, Circuit Judges.

CANBY, Circuit Judge:

Patrick Fennessy claims that Southwest Airlines Co. violated section 152, Fourth of the Railway Labor Act ("RLA" or "the Act"), 45 U.S.C. §§ 152-188, by terminating his employment in retaliation for his efforts to replace his existing union with a different one. Fennessy appeals the district court's grant of summary judgment in favor of Southwest. We reverse.

I.

While employed as a ramp agent for Southwest, Fennessy became a member of the Ramp Operations & Provisioning Agents ("ROPA"), as required by the parties' Collective Bargaining Agreement. ROPA has been the recognized collective bargaining representative for Southwest ramp agents since 1988. Asserting that he was dissatisfied with ROPA's representation, Fennessy unsuccessfully engaged in efforts to organize support for representation by the Teamsters Union.

While driving a baggage cart as part of his duties as a ramp agent for Southwest, Fennessy struck an aircraft, causing a superficial 18-inch scratch on the plane's surface and a brief delay before a take-off. Southwest subsequently held a factfinding session concerning that accident, after which Fennessy's employment was terminated. The stated reason for Fennessy's termination was his striking the aircraft and failing to report it in accordance with Southwest's policy.

Following the accident, Fennessy sought and obtained the assistance of the ROPA representative. Upon completion of Southwest's factfinding session, Fennessy filed a grievance through ROPA concerning his termination. After a hearing, a Systems Board of Adjustment, consisting of two members of Southwest's management and two ROPA members, upheld Fennessy's termination.

Fennessy then brought this action in district court, alleging that Southwest violated 45 U.S.C. § 152, Fourth, by terminating his employment in retaliation for his having engaged in activities to replace ROPA with a Teamsters representative. On appeal, Fennessy also contends that

ROPA did not fairly represent him in the Adjustment Board hearing.

II.

Congress adopted the RLA to provide "a comprehensive framework for the resolution of labor disputes in the railroad industry." *Atchison Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562-63, 107 S.Ct. 1410, 1414, 94 L.Ed.2d 563 (1987).[1] The Act's coverage has been extended to airlines. 45 U.S.C. § 181. The Act sets forth procedures for dealing with both "major" and "minor" disputes. Major disputes are those arising "'out of the formation or change of collective [bargaining] agreements covering rates of pay, rules, or working conditions.'" *Buell*, 480 U.S. at 562-63, 107 S.Ct. at 1414 (internal quotations omitted) (citation omitted.). Minor disputes "grow [ ] out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." *Id.* at 563, 107 S.Ct. at 1414 (quoting 45 U.S.C. § 153 First (i)) (internal quotes omitted); *see also Consolidated Rail Corp. v. Railway Labor Executives' Ass'n ("Conrail")*, 491 U.S. 299, 302-04, 109 S.Ct. 2477, 2480-81, 105 L.Ed.2d 250 (1989) (distinguishing between major and minor disputes). The parties agree that Fennessy's claim is not a major dispute.

The parties disagree, however, as to whether Fennessy's discharge involves a minor dispute. The answer depends upon how the dispute over the discharge is framed. The grievance that Fennessy submitted, through ROPA, to the

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[1] We review a grant of summary judgment *de novo*, *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1261, 134 L.Ed.2d 209 (1996).

Adjustment Board unquestionably was a minor dispute. The issue was whether Fennessy's termination was based on proper cause within the meaning of the collective bargaining agreement. *See Conrail*, 491 U.S. at 307, 109 S.Ct. at 2483 ("[D]ispute is minor if the action is arguably justified by the terms of the parties' collective bargaining agreement."); *see also Hawaiian Airlines, Inc. v. Norris*, ___U.S.___, ___, 114 S.Ct. 2239, 2245, 129 L.Ed.2d 203 (1994). No claim was raised in these proceedings, or asserted by Fennessy at the time, that his discharge was in retaliation for his organizing activities.

The Adjustment Board's decision is binding on Fennessy with regard to what it decided: that his discharge did not violate the collective bargaining agreement. Judicial review of the Adjustment Board's decision of such a minor dispute is "among the narrowest known to the law." *Buell*, 480 U.S. at 563, 107 S.Ct. at 1414 (internal quotations omitted) (citation omitted). The Board's findings and order may only be set aside for a failure of the Board to comply with procedural or jurisdictional requirements of the Act, for fraud, or for corruption. 45 U.S.C. § 153, First(q).

Fennessy did not seek review of the Board's decision, however. Instead, he brought this action in district court, alleging that his discharge was in retaliation for his Teamster organizing activities and that it accordingly gave rise to an independent statutory claim under 45 U.S.C. § 152, Fourth. Section 152, Fourth provides:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. . . . No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor

> organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization. . . .

45 U.S.C. § 152, Fourth. Fennessy argues that Southwest Airlines terminated him in order to interfere with his right to organize the labor organization of his choice. Fennessy contends that, because his claim is based on a statutory provision rather than on the collective bargaining contract, it is not a minor dispute that must be brought to a Board of Adjustment; it is a statutory claim that he may bring directly in district court.

Fennessy is correct. If there was any doubt before whether a statutory claim could constitute a minor dispute, it was dispelled by *Hawaiian Airlines v. Norris*, __U.S.___, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994). *Norris*, which was decided after the district court ruled in this case, involved a question whether state-law claims of discharge in violation of public policy and discharge in violation of a "whistleblowers' protection" statute were preempted by the RLA. The discharged worker had unsuccessfully grieved his discharge under the adjustment process, and then had sued in state court. In holding the claims not preempted, the Supreme Court first had to address the question whether the claims were "minor disputes" that were subject exclusively to the RLA grievance process, which would preempt state law. It expressly rejected the defendants' argument that "'grievances' should be read to mean all employment-related disputes, including those based on statutory or common law." *Id.* at ___, 114 S.Ct. at 2244. Instead, the Court held that "the category of minor disputes contemplated by § 151a are those that are grounded in the collective bargaining

agreement." *Id.* at __, 114 S.Ct. at 2245; *see also Conrail*, 491 U.S. at 307, 109 S.Ct. at 2482-83. Accordingly, "the RLA's mechanism for resolving minor disputes does not pre-empt causes of action to enforce rights that are independent of the CBA." *Norris*, __ U.S. at __, 114 S.Ct. at 2246. Thus the mere fact that Fennessy's discharge could be grieved on contractual grounds under the CBA does not mean that his statutory claim under the RLA is a minor dispute.

The fact that Fennessy's claim is not a minor dispute does not ensure his success on this appeal, however. *Norris* is distinguishable from this case, because it dealt with common-law or statutory claims arising wholly apart from the RLA. Here, Fennessy attempts to assert a private right of action under section 152, Fourth of the RLA. Wholly apart from the "minor dispute" issue, his ability to avail himself of that remedy depends upon the reach of section 152, Fourth and whether it extends to the circumstances of Fennessy's case.

Section 152, Fourth has been viewed "as addressing primarily the precertification rights and freedoms of unorganized employees." *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 440, 109 S.Ct. 1225, 1234, 103 L.Ed.2d 456 (1989). The reason is that, once a bargaining representative is certified, the RLA dispute-resolution system is put in place and judicial intervention is generally unnecessary and undesirable. *Id.* at 441, 109 S.Ct. at 1234-35. For this reason, the district court concluded that section 152, Fourth offered no private right of action to Fennessy, because a union had been certified to represent him and the grievance procedure was available and utilized.

The difficulty with this view is that the grievance procedure is designed, as *Norris* indicates, to deal with *contractual* issues arising under the collective bargaining agreement. *Norris,* ___U.S. at ___, 114 S.Ct. at 2245. If Fennessy's statutory rights have been violated, the fact that ROPA may represent him before the Adjustment Board does nothing to remedy that problem. Judicial recognition of his cause of action would therefore seem to be one of "those cases where 'but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act.'" *Trans World Airlines,* 489 U.S. at 441, 109 S.Ct. at 1235 (quoting *Switchmen's v. National Mediation Bd.*, 320 U.S. 297, 300, 64 S.Ct. 95, 96-97, 88 L.Ed. 61 (1943)).

Southwest contends, however, that recognition of a private right of action for employees who have a bargaining representative will utterly defeat Congress's intent in the RLA "to keep railroad labor disputes *out of the courts.*" *Lewy v. Southern Pac. Transp. Co.*, 799 F.2d 1281, 1289 (9th Cir.1986). For this reason, Southwest argues, the cases that recognize a private right of action either are limited to claims brought by employees prior to certification of a collective bargaining representative, or depend upon a violation of the right of fair representation that distorted the grievance process.

Our reading of the cases does not bear out Southwest's contention. It is quite true that some courts have expressed considerable uneasiness in recognizing a private right of action for employees who have a bargaining representative. Perhaps most explicit is *International Ass'n of Machinists v. Northwest Airlines, Inc.*, 673 F.2d 700 (3rd Cir.1982). There a union sued an airline for several disciplinary actions

that it contended were designed to undermine the union's representation. The disciplinary actions were initially grieved. The Third Circuit discussed the precertification emphasis of section 152, Fourth, and stated that it found a lack of authority for entertaining an action under that statute when a collective bargaining agreement was in existence. *Id.* at 709. It added, however: "We do not foreclose the possibility that given the appropriate case and the appropriate circumstances such an action could be brought in federal court." *Id.* Moreover, the court denied the right of action only because the employer's affidavits denying anti-union motivation went uncontroverted. *Id.* at 710-12.

Our seminal decision under section 152, Fourth was *Burke v. Compania Mexicana De Aviacion, S.A.*, 433 F.2d 1031 (9th Cir.1970). *Burke* involved a claim where the grievance procedure was unavailable, and we made some point of that fact:

> [Burke] was discharged [from his employment] before he was able to extend union coverage to his unit. Thus he is not a member of the union, and the union has no duty or desire to represent him. If Burke cannot sue to enforce the Act, no one can. Such a result is inconsistent with Congress' concern that [§ 152, Fourth] be backed by adequate penalties and could not have been intended.

Id.

We relied on no such rationale, however, when later we entertained an action under section 152, Fourth in *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935 (9th Cir.1987). In that case, we permitted union pilots returning to work after the conclusion of a strike to seek to enjoin polygraph examinations that they alleged were imposed as anti-union

discrimination. We stated that "[a]n implied right of action exists under this section." *Id.* at 936; *see also Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir.1987) (citing *Arcamuzi* for proposition that "[t]his circuit has held that an implied private right of action exists under RLA [§ 152, Fourth]."), *cert. denied*, 486 U.S. 1006, 108 S.Ct. 1732, 100 L.Ed.2d 196 (1988). We did not discuss whether a certified bargaining representative existed or whether a grievance procedure was in place; we simply applied the statute.

Other cases relied upon by Southwest also do not appear to depend upon an absence of a collective bargaining representative. In *Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922 (1st Cir.1983), the First Circuit upheld a private right of action for an inspector who was discharged because he sought to organize the inspectors. No bargaining representative appears to have been certified, but the First Circuit did not mention that point. In rejecting the employer's contention that section 152, Fourth was only enforceable by criminal proceedings, the court simply noted that every court that had considered the question had found an implied right of action under section 152, Fourth. *Id.* at 924.[2]

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[2] Because we believe the outcome of this appeal is controlled by cases in which we have previously recognized a private right of action under § 152, Fourth of the RLA, we do not analyze Fennessy's assertion of a private right of action under the standards enunciated in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). *Cf. Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922 (1st Cir. 1983) (applying *Cort* to question of whether plaintiff could maintain a private right of action under the RLA § 152, Fourth). We recognized a private right of action under § 152, Fourth before *Cort*, *see Burke v. Compania Mexicana De Aviacion, S.A.*, 433 F.2d 1031, 1033-34 (9th Cir.1970), and have followed our holding in *Burke* after *Cort*, *see, e.g., Arcamuzi v. Continental Air Lines Inc.*, 819 F.2d 935, 936 (9th Cir.1987) (citing

We find the same phenomenon when we examine the post-certification cases that Southwest asserts are dependent upon a finding of a violation of the duty of fair representation. In *Roscello v. Southwest Airlines Co.*, 726 F.2d 217 (5th Cir.1984), an operations agent sued the airline under section 152, Fourth. He had attempted without success to organize the agents under the Teamsters. The airline recognized a competing union, and three days later fired the agent. He grieved his discharge through the new union without success. He then sued the airline and added an unfair representation claim against the new union. The Fifth Circuit held that the agent was entitled to a jury trial on his unfair representation claim, and with regard to the statutory claim noted:

> The parties do not question whether the plaintiff has a private right of action for wrongful discharge under the Railway Labor Act. Therefore we assume without deciding that plaintiff has properly stated a claim. Furthermore, there seems to be no doubt that this claim, which rests not upon a collective bargaining contract, but upon a charge that Southwest violated the statute, was within the jurisdiction of the district court rather than an adjustment board.

Id. at 220 n. 2 (internal citations omitted). No mention was made of the necessity for an unfair representation claim to accompany the section 152, Fourth claim.

Similarly, in *Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914 (7th Cir.1974), the Seventh Circuit entertained a claim

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Burke for proposition that "[a]n implied right of action exists under [§ 152, Fourth of the RLA]."). *See generally Stepanischen*, 722 F.2d at 925-27 (concluding that our reasoning in *Burke* survived *Cort*).

under section 152, Fourth of a probationary pilot who had been dischaRged. The union had refused to grieve his discharge, and he added a claim against it for violation of the duty of fair representation. The court of appeals held that the pilot had raised a triable issue of fact on his section 152, Fourth claim, but *had not* raised a triable issue against the union for violation of the duty of fair representation. *Id.* at 917-19. *Conrad* accordingly cannot be said to depend on a requirement of a fair representation violation; quite the contrary, it demonstrates that a triable statutory claim can be brought in the absence of such a violation.

There is a common-sense reason why these cases do not depend on a violation of the right of fair representation in order for an employee to maintain a private action under section 152, Fourth. Because the Board of Adjustment has no jurisdiction over the statutory claim, fair representation in the grievance proceeding is of no use to the statutory-claim plaintiff.

It is fortunate for Fennessy that a viable fair representation claim is not a requisite for maintenance of a private action under section 152, Fourth. Fennessy did not raise an unfair representation argument until he reached this court. He pleaded no claim of violation of the right of fair representation, and he laid no evidentiary groundwork in the district court to support such a claim. Consequently, no unfair representation claim is properly before us.

III.

In summary, we conclude that Fennessy has a private right of action under section 152, Fourth, and that his statutory claim is not a minor dispute. The district court, acting without the benefit of the Supreme Court's recent

decision in *Norris*, erred in ruling to the contrary. We therefore reverse its judgment and remand for further appropriate proceedings. We decline to rule on other issues not reached by the district court.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PATRICK FENNESSY,	)	
	)	
Plaintiff,	)	CASE NO. CV 93-2820 RG (Sx)
v.	)	
	)	
SOUTHWEST AIRLINES CO., et al.	)	ORDER*
	)	
Defendants.	)	
	)	

Defendant Southwest Airlines Co.'s ("Southwest") Motion for Summary Judgment came on for hearing before this Court on Monday, March 28, 1994, at 10:00 a.m. Having considered the moving and opposition papers and arguments of counsel, the Court hereby makes the following findings of fact and conclusions of law:

I. Introduction

Plaintiff Patrick Fennessy ("Fennessy" or "plaintiff") was employed as a ramp agent for defendant Southwest Airlines Co. ("Southwest") at Southwest's Burbank station from March 1990 through December 1992. As required by the parties' collective bargaining agreement, Fennessy became a member of the Ramp Operations and Provisioning Agents ("ROPA") following his date of employment with Southwest. Jim Chancellor Decl. ¶ 2; Fennessy Depo. p. 46, 1.24 - p.

* Filed March 28, 1994, Clerk, U.S. District Court, Central District of California; entered March 30, 1994, Clerk, U.S. District Court, Central District of California.

47, 1.10. ROPA has been the recognized collective bargaining unit for Southwest Ramp agents since 1988. Jim Chancellor (Ground Operations Dept. Director) Decl. ¶ 2.

On December 4, 1992, while carrying out his duties as a ramp agent for Southwest, Fennessy struck an aircraft while driving a baggage cart, causing a superficial 18" scratch on the plane's surface and a brief delay before take-off.

On December 7, 1992, Southwest held a fact-finding session at the Burbank station concerning the December 4 accident, after which Fennessy's employment was terminated. The stated reason for Fennessy's termination was his striking the aircraft and failing to report it in accordance with Southwest policy.

At the time of the December 4 accident, plaintiff sought and obtained the assistance of the ROPA representative at the Burbank station in connection with the December 7 fact-finding meeting. Fennessy then filed a grievance concerning his termination through ROPA. On January 25, 1993, a Systems Board of Adjustment hearing was held regarding Fennessy's termination. The Systems Board, consisting of two members of defendant's management and two ROPA members, upheld Fennessy's termination.

II. Plaintiff's Claim for Wrongful Discharge is a "Minor Dispute" under the Railway Labor Act, and this Court Therefore Lacks Jurisdiction to Decide It.

The congressional policy behind the RLA was to promote stability in labor-management relations by "provid[ing] a comprehensive framework for the resolution of labor disputes in the railroad industry." Edelman v.

Western Airlines, Inc., 892 F.2d 839, 842-43 (9th Cir. 1989) (quoting Atchison, Topeka & Santa Fe Railway Co. v. Buell, 480 U.S. 557, 562 (1987) ("Buell")). This framework was to provide for the resolution of disputes "growing out of grievances or out of . . . agreements covering rates of pay, rules, or working conditions," 45 U.S.C. § 151a, outside the courts. Lewy v. Southern Pacific Transportation Co., 799 F.2d 1281, 1289 (9th Cir. 1986) ("Congress specifically intended the RLA to keep railroad labor disputes out of the courts."). The RLA's coverage is extended to airlines as well as railroads in Title II of the RLA. 45 U.S.C. § 181.

A. What is a "Minor Dispute?"

Disputes which "grow[] out of grievances" are considered "minor disputes," Buell, 480 U.S. at 563, and are dealt with by a specific procedure provided for in section 184 of the RLA. Initially, these disputes must be dealt with through an airline's internal dispute resolution processes, and if not settled there, may be submitted to a Board of Adjustment, which is a statutorily created body with jurisdiction over such claims. 45 U.S.C. § 184.

Generally, a party who has litigated an issue before the board of adjustment on the merits may not relitigate that issue in an independent judicial proceeding. Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320, 325 (1972). An aggrieved party may seek review in the courts **only** for the board's failure to follow the procedures provided for in the RLA or for fraud or corruption of a board member. 45 U.S.C. § 153(q).

B. Ninth Circuit Law

The Ninth Circuit has classified wrongful discharge claims, such as the one at bar, as "minor disputes" subject to the exclusive jurisdictional provisions of section 184. Magnuson v. Burlington Northern Inc., 576 F.2d 1367 (9th Cir.), cert. denied, 439 U.S. 930 (1978); Lewy v. Southern Pacific Transportation Co., 799 F.2d 1281 (9th Cir. 1986); Croston v. Burlington Northern Railroad Co., 999 F.2d 381 (9th Cir. 1993). See also Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 491 U.S. 299, 105 L.Ed.2d 250, 261 (1989) ("major disputes seek to create contractual rights, minor disputes to enforce them"); Hirras v. Nat'l Railroad Passenger Corp., 10 F.3d 1142, 1145 (5th Cir. 1994) (minor disputes include any claims "founded upon some incident of the employment relationship" even independent of the collective bargaining agreement).

In sum, as plaintiff herein is seeking redress for harm suffered as a result of his discharge from Southwest, and his employment relationship is governed by the ROPA agreement, this Court considers his claim a "minor dispute" subject to the provisions of section 184 of the RLA. Because this claim has already been considered by the board of adjustment, and plaintiff does not allege any procedural improprieties with that process, this Court lacks jurisdiction to consider the merits of plaintiff's claim.

C. Plaintiff's Counterargument

Plaintiff, however, disputes that his claim is a "minor dispute" subject to the exclusive jurisdiction of the board of adjustment. For support, plaintiff relies primarily on the Tenth Circuit's decision in Davies v. American Airlines,

Inc., 971 F.2d 463 (10th Cir. 1992), cert. denied, 124 L. Ed. 2d 657 (10th Cir. 1992).

In Davies, the "gravamen" of plaintiff's action was that his employer's primary motivation in firing him, regardless of any "just cause", was to stop his unionizing activity. Id. at 466. The Davies court adopted a position contrary to that of this circuit, namely that Davies' action did not require interpretation of a collective bargaining agreement and was thus not preempted by the RLA. The Davies court extended the holding of Lingle v. Magic Chef, 486 U.S. 399 (1988), a case involving a retaliatory discharge claim under the Labor Management Relations Act ("LMRA")[1], to RLA claims.

However, the Ninth Circuit had previously refused to make the same extension of Lingle, and distinguished Lingle as applying to LMRA cases, not RLA cases. See Grote v. Trans World Airlines, Inc., 905 F.2d 1307 (9th Cir.), cert. denied, 498 U.S. 958 (1990) ("[t]he preemption created under the RLA and that arising under § 301 of the LMRA are not analogous. . . . [B]ecause the RLA's preemptive force appears on the face of the statute and § 301 preemption is judicially imposed, we conclude that preemption under the RLA is broader than under § 301."). Since Davies is not the law of this circuit, plaintiff's argument must fail and his claim deemed a "minor dispute" subject to the arbitral provisions of the RLA.

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[1] Section 301 of the LMRA states that "suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States." 29 U.S.C. § 185(a) (1982).

III. Plaintiff's Second Claim for Violation of the RLA, § 152, Fourth, Cannot Stand, Because There is No Private Right of Action for an Employee Already Represented by a Collective Bargaining Representative.

Fennessy also attempts to state a claim under section 152, (Fourth) of the RLA, which provides, in pertinent part:

> No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization.

45 U.S.C. § 152 (Fourth). By enactment of this provision, Congress sought to protect employees' rights by ensuring that employees' designation of bargaining representatives would be free from employer coercion or interference. International Ass'n of Machinists & Aerospace Workers v. Northwest Airlines, 673 F.2d 700, 707 (3d Cir. 1982). To further this aim, Congress empowered the National Mediation Board to resolve representational disputes. 45 U.S.C. § 152 (Ninth).

Plaintiff asserts that he can maintain a private right of action under section 152 (Fourth) for his wrongful discharge. However, as defendant aptly points out, section 152 (Fourth) provides only limited rights outside the context of representational disputes. See International Ass'n of Machinists, 673 F.2d at 707. For instance, plaintiff would have had a right against wrongful discharge for his

participation in union organizing campaigns prior to a designation of a representative or to a certification by the mediation board. See, e.g., Burke v. Compania Mexicana De Aviacion, S.A., 433 F.2d 1031 (9th Cir. 1970) (a private right of action exists for plaintiff-employee where employee was not a union member because his employee unit was excluded from the certification election). But, section 152 (Fourth) has no relevance once a bargaining representative, such as ROPA here, has been designated, because with a bargaining agreement in place, employees have a viable mechanism (the board of adjustment) through which to dispute their discharges. International Ass'n of Machinists, 673 F.2d at 707, 707 n.6.[2] But see Independent Union of Flight Attendants v. Pan American, 789 F.2d 139, 141-42 (2d Cir. 1985) (the statutorily-created adjustment board procedure might be considered ineffective, and federal judicial intervention is warranted, only where it is clear that the employer's conduct has "been motivated by anti-union animus or . . . an attempt to interfere with its employees' choice of their collective bargaining representative.") (quoting Tello v. Soo Line R.R., 772 F.2d 458, 462 (8th Cir. 1985)) (emphasis added).[3]

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[2] International Ass'n of Machinists involved a claim by a recognized collective bargaining agent that four shop stewards had been discharged or suspended on sham charges because of their employer's anti-union animus. Pursuant to a procedure provided in the collective bargaining agreement, the stewards had brought grievances and had hearings before a board of adjustment. The Third Circuit vacated the district court's finding of jurisdiction and held that the board of adjustment was the sole and proper method for resolving these disputes.

[3] This Court need not analyze plaintiff's claim under the Eighth Circuit's interpretation of section 152 (Fourth) in Tello, 772 F.2d at 462. However, even if Tello applies, it is not clear to this Court that the board of adjustment procedure in which plaintiff participated was ineffective

As plaintiff has had an adequate remedy to dispute his discharge (the board of adjustment hearing), this Court holds that plaintiff's claim under section 152 (Fourth) must fail as a matter of law.

IV. Plaintiff's Complaint Does Not Mention a State Law Claim Which Would Not Be Preempted by the RLA.

In his opposition papers, plaintiff presents, for the first time, a claim that his discharge violated California Labor Code section 923, which states in pertinent part that an employee "shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of [union] representatives . . ." As plaintiff's Complaint asserted that "[t]his is an action arising under the Railway Labor Act . . .", and plaintiff made no mention of a state law employment claim, plaintiff has not met the requirements for notice pleading set forth in Fed. Rule Civ. Proc. 8.

In any event, as explained in section II, supra, any claim relating to plaintiff's alleged wrongful discharge is preempted by the RLA. See Edelman, 892 F.2d at 843 (if the basic injury complained of is wrongful discharge, the complaint involves a minor dispute which must be arbitrated in accordance with the RLA).

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due to anti-union animus on the part of Southwest management or ROPA. See International Ass'n of Machinists, 673 F.2d at 712 (plaintiff may not rely on "conclusory allegations" that the employer interfered with the union's representation of its members).

V. Conclusion

It is THEREFORE ORDERED, ADJUDGED, AND DECREED that defendant Southwest's Motion for Summary Judgment is HEREBY GRANTED in its entirety. As plaintiff Fennessy's claims for wrongful discharge and violation of 45 U.S.C. § 152 (Fourth) are "minor disputes" subject to the provisions of the Railway Labor Act, this Court is without jurisdiction to decide them. Furthermore, any state claim plaintiff may proffer is likewise preempted.

IT IS SO ORDERED.

/s/
RICHARD A. GADBOIS, JR.
United States District Judge

DATED: March 28, 1994

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICK FENNESSY,	)	
	)	
Plaintiff-Appellant	)	CA No. 94-55630
	)	
v.	)	DC No. CV-93-02820-RG
	)	
SOUTHWEST AIRLINES,	)	ORDER*
	)	
Defendant-Appellee	)	
	)	

BEFORE: FLETCHER, CANBY, and HAWKINS, Circuit Judge

The panel has voted to deny defendant-appellee's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Filed December 6, 1996, Cathy A. Catterson, Clerk, U.S. Court of Appeals.

Relevant Provisions of the Railway Labor Act

45 U.S.C. § 151a provides in relevant part:

> The purposes of the chapter are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; . . . (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 152, First provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152, Fourth provides in relevant part:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. . . . No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in

> organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . .

45 U.S.C. § 152, Eighth provides in relevant part:

> Every carrier shall notify its employees by printed notices . . . that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

45 U.S.C. § 153, First (q) provides in relevant part:

> If any employee . . . is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee . . . may file in any United States district court . . . a petition for review of the division's order. . . . The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or

> confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

45 U.S.C. § 184 provides in relevant part:

> The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board . . . .
>
> It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system . . . boards of adjustment under section 153 of this title.